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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARGARET HENNESSEY, Defendant and Appellant.	G028936 (Super. Ct. No. 00HF0704) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Everett W. Dickey, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

James M. Crawford for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Holley A. Hoffman and Douglas P. Danzig, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Margaret Hennessey of driving under the influence of alcohol and offering a bribe to a police officer, and found she willfully refused to submit to chemical testing. She admitted a prior DUI conviction. Defendant complains of *Miranda* and instructional error, prosecutorial misconduct, and the insufficiency of the evidence to support the drunk driving conviction. None of these contentions has merit and we affirm.

I

Newport Beach Police Officer Glen Garrity stopped defendant's Porsche Boxster around 3:00 a.m. on June 26, 2000, because the car's headlights were off. Defendant appeared intoxicated, and Garrity asked her to leave the car. She did so with a "slow-moving hesitancy," using the door to support herself, and swayed slightly as she stood next to her car. She explained she was in an embarrassing situation: Her passenger was not her husband, and she was on her way back to the passenger's apartment. Garrity smelled alcohol on defendant's breath and noticed her face was flushed. An eye (nystagmus) test also indicated intoxication. In response to questioning, defendant admitted she had consumed two vodka drinks earlier that evening. Defendant performed poorly on the field sobriety tests, and Garrity arrested her for driving under the influence of alcohol. She then advised Garrity she was married to a senator's grandson, the incident would prove embarrassing, and offered $1,000 if he did not arrest her. Garrity placed defendant in the patrol car and drove toward the police station, in the same direction as her residence. Thinking the officer was taking her home, defendant remarked Garrity "was saving her a lot of trouble . . . [and] embarrassment." She motioned him to change lanes as they approached her apartment. Garrity ignored her and continued driving toward the police station. Defendant became hostile, called Garrity names and said he "blew it," exclaiming, "$1,000 is now going to go to the court when you could have had it." At the station, she initially consented to a blood test, but refused when the technician arrived.

Defendant's passenger, Walid Lodin, testified he met defendant and her

friend earlier that night outside a Newport Beach bar. He invited the pair to his home "to come over to either sober up or do whatever . . . ." The trio walked to Lodin's residence and defendant declined Lodin's offer of a drink. Concerned about her car, she and Lodin walked back to the parking lot 30 minutes later. Lodin thought she could drive safely, but they were pulled over on their way back to Lodin's residence. Lodin did not think she was under the influence but in a pretrial interview conceded she might have been "borderline" intoxicated.

Defendant's husband bought the Porsche for his wife two weeks before the arrest. Before that she drove a 2000 Corvette, which had headlights that came on automatically at dark.

In a 1994 incident, Orange County Deputy Sheriff Russell Chilton arrested defendant for hit and run and furnishing false information to a police officer. Defendant also had an outstanding warrant. Chilton informed defendant of the charges and placed her in the patrol car. She offered to pay Chilton and two other officers $300 each if they would let her go.

II

Defendant contends the statements she made to Garrity as he drove past her home were obtained in violation of *Miranda*. Garrity's actions, we are told, were the functional equivalent of an interrogation. "Garrity reasonably knew or should have known that by electing to drive right past defendant's home, he was likely to illicit [*sic*] an incriminating statement from her . . . ." We disagree.

At a pretrial suppression hearing, Garrity testified defendant offered him $1,000 if he would let her go. He checked the microphone transmitter on his belt (as it turned out, it malfunctioned) and feigned interest so he could "get the elements of the crime . . . ." Garrity asked her to repeat the offer, and informed defendant his partner, Officer Green, would have to be included. Green approached. Defendant hesitated and commented she hoped she was not making things worse. Garrity told her to get in the patrol car and to "get it over with." Defendant repeated her offer to Green, and the

officers placed her in the back of the police car. Green informed defendant everything was being taped and pointed to a microphone around his neck. After Green departed, defendant asked Garrity to turn off the tape recorder. He pointed to a switch on his laptop computer and said it was off. She repeated the offer, directed him to drive to her apartment and promised her husband would supply the rest of the money. Defendant became hostile when she realized Garrity passed her apartment. Stating he "blew it," defendant stated, "you could have had the thousand dollars but now it's going to go to the court." Garrity did not advise defendant of her *Miranda* rights before she made any of these statements. The trial court ruled only the initial bribe and her final statement were admissible.

Custodial interrogation requiring *Miranda* warnings "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *People v. Sims* (1993) 5 Cal.4th 405, 440 [officer's statements describing results of investigation to an in-custody defendant were the functional equivalent of interrogation, rendering defendant's statements inadmissible under *Innis*].) Statements willingly volunteered in the absence of interrogation are admissible however, even if preceded by a noncoercive *Miranda* violation. (*People v. Torres* (1989) 213 Cal.App.3d 1248, 1255.) The trial court must consider the totality of the surrounding circumstances and the entire course of police conduct in determining whether the defendant's statements were voluntary. (*Ibid.*)

Here, there was ample evidence to support the conclusion defendant's statement was an uncoerced, voluntary admission. Defendant's apartment is located only one block from the turnoff to the station. Garrity did no more "than . . . drive past [defendant's apartment] . . . while taking the most direct route to the police station" when defendant "blurted out" her statement. (*Rhode Island v. Innis*, *supra*, 446 U.S. at p. 303, fn. 10.) "[I]t could not seriously be argued that this 'subtle compulsion' would have constituted 'interrogation' within the meaning of the *Miranda* opinion." (*Ibid.*)

Defendant contends *Dickerson v. United States* (2000) 530 U.S. 428 implicitly overruled *People v. Torres, supra,* 213 Cal.App.3d 1248 and *Oregon v. Elstad* (1985) 470 U.S. 298 (*Elstad*), the cases on which the trial court based its decision. *Torres*, citing *Elstad*, concluded volunteered statements following a noncoercive *Miranda* violation were admissible. (*Torres, supra,* 213 Cal.App.3d at p. 1255.) Because *Dickerson* held *Miranda* was of constitutional dimension, defendant assumes the Fourth Amendment's "fruit of the poisonous tree" analysis now applies to voluntary statements that follow a noncoercive *Miranda* violation.

Defendant confuses Fourth and Fifth Amendment concepts. Suffice it to say the remedy for noncoercive *Miranda* violations followed by a voluntary statement is not identical to the Fourth Amendment's exclusionary rule. As the Supreme Court explained: "Our decision in [*Elstad*] — refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases — does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." (*Dickerson v. United States, supra,* 530 U.S. at p. 441.)

Applying an independent standard of review to the facts found by the trial court (see *People v. Waidla* (2000) 22 Cal.4th 690, 730), we conclude the trial court did not err in admitting defendant's statement.

III

Pursuant to Evidence Code section 1101, the trial court permitted the prosecution to use the 1994 bribery incident to prove defendant harbored the same criminal intent in offering Garrity money to release her. Defendant argues the evidence was irrelevant and prejudicial, claiming evidence of intent from an earlier incident is admissible only if the charged criminal act is conceded or assumed. For support, she relies on the following passage in *People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2: "Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense.

'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.]" (Original italics.)

The gist of defendant's argument is that evidence of intent from a similar incident is admissible only if defendant solely contests the element of intent, but not if defendant denies all the elements of the offense, including intent. This is illogical and not a correct statement of the law.

Ewoldt recognized all the elements of the offense, including intent, are placed in issue by the defendant's not guilty plea, "'unless the defendant has taken some action to narrow the prosecution's burden of proof.'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 400, fn. 4.) The prosecution's burden of proving every element of an offense is not relieved simply because defendant chooses not to contest an essential element of the crime. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69.) Defendant could have prevented introduction of the other crimes evidence by conceding intent was not in issue. She chose not to do this, although the trial court warned her "unless you narrow the prosecution's burden of proof by some kind of stipulation," evidence of the other incident would be admitted. Accordingly, the trial court did not abuse its discretion in admitting the 1994 incident.

IV

Defendant also argues the court erred by instructing the jury that "[a] person holding the position of Newport Beach Police Officer qualifies as an executive officer in this state." She argues this "instruction completely withdrew from the jury the question whether . . . Garrity was an executive officer performing executive duties." Local law enforcement officers *are* executive officers within the contemplation of Penal Code section 67. (*People v. Mathews* (1954) 124 Cal.App.2d 67; 2 Witkin, Cal. Criminal Law (3d ed. 2000) § 34, p. 1125; see *People v. Strohl* (1976) 57 Cal.App.3d 347 [construction of a statute by judicial decision becomes a part of it].) As the court noted, the jury still "theoretically could determine that he was not a Newport Beach police

officer, which of course would be contrary to all the evidence in this case." (See *People v. Brown* (1988) 46 Cal.3d 432, 443-444, and fn. 6 [jury properly instructed that a Garden Grove police officer was a "peace officer" within meaning of special circumstance allegation because legal point not open to dispute; court did not instruct the jury that Officer Reed was a peace officer as a matter of law; it merely instructed pursuant to the unquestionable and clear terms of the relevant statutes that Garden Grove police officers are peace officers]; cf. *People v. Flood* (1998) 18 Cal.4th 470 [error to instruct *that a particular officer is a peace officer*].)

Contrary to defendant's assertions, *Apprendi v. New Jersey* (2000) 530 U.S. 466 is not applicable here. *Apprendi* held the Fourteenth Amendment requires a jury to make factual determinations that render a defendant eligible for an increased sentence (apart from prior convictions). The determination of Garrity's status as an executive officer was required because it is an element of the offense, not a factor that could potentially increase the sentence. The trial court's instruction informed jurors a Newport Beach police officer is an executive officer under the statute, but the jury was required to find that Garrity fit within the definition. There was no error.

V

Hennessey next contends the court erred by instructing with a version of CALJIC No. 4.21.1. The instruction told the jury, in substance, that voluntary intoxication was not a defense to the driving under the influence charge but could be considered in determining whether a person possessed the intent to bribe. The instruction provided in pertinent part, "It is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of this condition. [¶] Thus, in the crime of driving under the influence of alcohol charged in Count 2, and the refusal allegation, *the fact that the defendant was voluntarily intoxicated is not a defense* and

does not relieve defendant of responsibility for the crime." (Italics added.) Defendant asserts the instruction directed the jury to find she was intoxicated.

Defendant specifically requested the instruction; therefore, any error was invited and cannot be raised on appeal. (See *People v. Catlin* (2001) 26 Cal.4th 81, 150 [where defense counsel makes a conscious, deliberate tactical choice to request an instruction, any error in the giving of the instruction is invited and cannot be raised on appeal].) Defendant's argument is untenable, in any event. Although the instruction might have been more artfully worded, no reasonable juror would interpret it as a comment or directive that defendant was under the influence. A separate paragraph in the same instruction states, "*If the evidence shows* that a defendant was intoxicated at the time of the alleged crime [i.e., bribery], you should consider that fact in deciding whether or not the defendant had the required specific intent." (Italics added.)

The court also instructed with CALJIC No. 16.830 that defendant was "accused" of driving under the influence and that "each of the following elements *must be proved*: (1) A person drove a vehicle; and [¶] (2) At the time, *the driver was under the influence of any alcoholic beverage*." (Italics added.) CALJIC No. 16.831 defined "under the influence" and provided: "*If* it is established that a person is driving under the influence of an alcoholic beverage, it is no defense that there was some other cause which also tended to impair her ability to drive with required caution." (Italics added.) The jurors also were directed to consider "*whether* the person operating the vehicle was or was not under the influence of an alcoholic beverage." (CALJIC No. 16.832, italics added.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538.)

Moreover, the lawyers devoted most of their final argument to debating whether the evidence showed defendant was under the influence. The prosecutor

explained the intoxication instruction related only to the bribery and that it was her position that defendant was *not* intoxicated as defined in that instruction: "And that's why we talked and talked about different ranges of sobriety, that there is falling-down drunk and there is under the influence. There is feeling the effects of alcohol. And it is the feeling of the effects of alcohol that causes you not to drive a vehicle as a sober person that makes you guilty of the driving under the influence. [¶] It's the falling-down-drunk, not knowing what you are doing or what you are saying. It's that level that makes you have a defense to specific-intent crimes such as a bribery."

No reasonable juror would have read the voluntary intoxication instruction to remove an element from the driving under the influence charge. There are no grounds for reversal.

VI

Hennessey next claims the court erred by designating Garrity as an expert and instructing with CALJIC No. 2.80. She insists the prosecution should have called a "toxicologist from the crime lab" to testify. The trial court did not abuse its discretion in determining Garrity had special knowledge, training and experience to recognize whether defendant was impaired on the night of her arrest. (See *People v. Gurrola* (1963) 218 Cal.App.2d 349 [narcotics agent qualified to opine defendant exhibited symptoms of narcotics withdrawal].) An 11-year officer, Garrity had received DUI training at the police academy, in the field, and in follow-up seminars and had participated in over 100 DUI investigations, performing field sobriety tests and arresting at least 50 people himself. Although the defense did object to the instruction, counsel did not object to Garrity's opinions. Also, as the court noted, the instruction could not have harmed Hennessey as it advised the jury to give Garrity's "opinion the weight you find it deserves."

Defendant also argues "there was no indication in the record that the prosecution ever advised the defense" it would not call a toxicologist and infers "defense counsel likely had no reason or motive to voir dire" Garrity as to his qualifications and experience as an expert witness. To the contrary, there is nothing in the record to suggest the defense was misled concerning the prosecution's witnesses.

VII

Defendant also challenges instructions touching on issues of juror misconduct, specifically the power to nullify. Defendant's arguments are meritless. CALJIC No. 17.42 has long passed muster as a necessary admonition not to consider penalty or punishment during their deliberations. (*People v. Allen* (1973) 29 Cal.App.3d 932, 936 ["It is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence"]; *People v. Nichols* (1997) 54 Cal.App.4th 21; see also *People v. Williams* (2001) 25 Cal.4th 441, 449 [juror has power but no right to nullify the law].)

As for CALJIC No. 17.41.1, which advises jurors to report to the court a juror who refuses to deliberate or expresses an intention to disregard the law, the issue was recently resolved in *People v. Engelman* (2002) 28 Cal.4th 436. The instruction should not be given in the future because of the risk jurors might misunderstand or abuse other jurors with it. But the Supreme Court also held it was not error to give the instruction. (*Id.* at p. 441.) We reach the same conclusion here.

VIII

Hennessey argues the prosecutor engaged in misconduct during closing argument. Addressing factors to consider in determining whether defendant drove under the influence, the prosecutor argued, "In addition . . . there is an instruction on refusal to take a sobriety test. I am not going to read this whole thing. Generally what it says is if somebody refuses to take a test of their blood or breath when asked by a police officer to

determine the alcohol content, that can be considered to show consciousness of guilt. [¶] If they had nothing to hide, why not give them a test? That's the general rule. Okay? [¶] The weight to which this is entitled, whether or not that conduct shows a consciousness of guilt are matters for your determination. You can say anybody in that situation would not give a blood test. If that's what you decide, that's what you decide. [¶] I will submit to you, *if you are not guilty of something, there is a way to prove that*. You will do it. And by refusing to take that blood or breath test, [defendant] is telling you, I am quoting, 'so you can incriminate me.'" Hennessey had made the "so you can incriminate me" statement at the time she refused the blood test.

Defendant complains the italicized portion of the prosecutor's argument unconstitutionally shifted the burden of proof: "[T]he prosecutor improperly argued to the jury that if appellant was not guilty of driving under the influence, she could have proven it by submitting to a chemical test." But there was no objection to this remark. A timely objection and admonition would have cured any harm, so the alleged error or misconduct was waived. (*People v. Riel* (2000) 22 Cal.4th 1153, 1212.) Considering the complaint on the merits, we note the prosecutor did not argue defendant bore the burden *at trial* to prove her innocence. In context, the prosecutor's comment referred to defendant's refusal to submit to a chemical test because she believed she was under the influence. There was nothing improper in that. And the jury was properly instructed on the presumption of innocence and burden of proof. There was no misconduct.

IX

Finally, defendant claims there is insufficient evidence she drove under the influence because "the prosecution failed to call a toxicologist or other qualified expert to testify whether [defendant's] physical condition and performance on the FST's was consistent with a person under the influence of alcohol." Not so. Garrity was amply qualified to opine she was too impaired to drive (see *People v. Smith* (1967)

253 Cal.App.2d 711) and a jury could decide the issue without an expert detailing a link between performance on field sobriety tests and driving. Because there were no chemical tests to interpret, a toxicologist could have added little to the mixture. Defendant drove without headlights, appeared intoxicated (slurred speech, bloodshot and watery eyes, smelled of alcohol, fumbled for her driver's license, hung on to the door for balance as she got out), admitted she drank alcohol, failed most of the field sobriety tests, refused to take a chemical test, and offered a bribe to avoid arrest. The jury saw the videotape of the field tests. This was more than ample evidence to sustain the conviction.

Judgment affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.